No. 85-924

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JOHN M. MURPHY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

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REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

This Petition questions the integrity of the judges of the Northern District of Illinois, Eastern Division, and of the 7th Circuit Court of Appeals as it applies to both obedience to and enforcement of 28 U.S.C. 455, a statute enacted and amended to assure the appearance of impartiality in every U. S. Court.

Since many (if not most) of the judges of said courts are former Assistant U. S. Attorneys, and since this petitioner, (and the companion petitioner in *Williams* v. *United States,* No. 85-6080) raise the same issue (alleged violations of 28 U.S.C. 455 by District Court Judge Charles Kocoras), it is necessary for the restoration of that integrity that this Court grant certiorari and compel enforcement of the duties imposed by said statute, since "protection of the integrity . . . of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *United States* v. *Columbia Broadcasting Systems, Inc.,* 497 F.2d 107, 109 (5th Cir., 1974).

That issue has not been addressed by the brief in opposition. Instead, it contains false statements and is misleading and seeks to divert the Court's attention from the underlying issue herein: A judge's *duty* under 28 U.S.C. § 455(a) to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned."

A. False Statements in Brief in Opposition

1. The Brief in Opposition (p. 6) states: "At a *hearing* on petitioner's motion, Judge Kocoras made the following *findings,* which Petitioner has not challenged." (Emphasis supplied)

The *fact* is, as shown by petitioner's Statement of Facts as [to] 28 U.S.C. § 455(a) Proceedings (Pet. p. 8), ". . . the trial judge denied petitioner's motion, *without hearing*" (Emphasis supplied, Rec. 128, App., Trans., March 1, 1985, pp. 3-6).

As shown by the record herein, (Rec. 128; App. Trans. pp. 3-6), *there was no hearing* and *Judge Kocoras made no findings.* Instead, the proceeding was a one-man-show with the judge making inaccurate, self-serving statements. The principal inaccuracy by the judge then is cited in the opposition brief (p. 6): "Judge Kocoras also found that petitioner had acknowledged that he was aware of this friendship [between Judge Kocoras, U.S. Attorney Webb and petitioner's principal trial attorney, Lydon] in the presence of the probation officer who prepared his pre-sentence report."

The facts are: 1) as shown by petitioner's affidavit filed in support of his Section 455(a) motion (Rec.119, Ex.C), at no time was petitioner told by Lydon, nor did he have any knowledge, of the existence of a close personal relationship between said Judge and Prosecutor. Also, Lydon's Affidavit (Rec. 119, Ex. B) stated that Lydon "did not discuss in detail [with petitioner] any relationship" between said judge and said prosecutor, but told petitioner that he, the judge and the prosecutor had "all worked together in the U. S. Attorney's Office and that all were still friends. Lydon's affidavit further stated he "recalls no further discussion with Murphy of any personal relationship among Judge Kocoras, Dan Webb, or himself." and, 2) the probation officer's affidavit filed by the Government (Rec. 122, Ex. A), stated "During the course of this conversation Mr. Murphy commented that some people had suggested to him that he should not have hired Matt Lydon as his attorney because of his friendship with Dan Webb and Judge Kocoras. Mr. Murphy said he responded to these people that he thought Mr. Lydon had done a very good job of representing him at trial."

Those statements in the probation officer's affidavit do not contradict either the affidavit of Lydon or Murphy as to petitioner's *unawareness* of the close personal relationship between Judge and prosecutor herein. Nor can they logically or fairly support the erroneous interpretation of them made by

Judge Kocoras. Clearly, they could not support the "finding" that the opposition brief (p. 6) falsely attributes to them.

2. This statement in the opposition brief (p. 9) is false:

> "... the unusual facts giving rise to petitioner's claims are not likely to recur with the frequency necessary to justify review by this Court.[1]

The falsity, of that assertion is shown by the following, *unchallenged* statement in the petition herein: (p. 13, fn. 3):

> "*Identical disregard of his duty to disqualify himself under 28 U.S.C. 455(a) by the same trial judge as herein occurred in United States v. Rovetusso,* 768 F. 2d 809" (Pet. 13, fn. 3)

See also *Williams* v. *United States,* No. 85-6080, which petitioner therein has asked this Court to consider together with the petition herein to enable this Court to evaluate Judge Kocoras' *repeated* violations of Section 455(a) in their context.

3. The brief in opposition (p. 12) falsely states:

> "*Potashnick* v. *Port City Construction Co.,* 609 F.2d 1101, 1111 (5th Cir.) cert. denied, 449 U.S. 820 (1980) expressly reserved this issue [whether a court would reverse a judgment under § 455(a) when the claim was not raised until after trial]; the court vacated the judgment because of a violation of § 455(b), which is not at issue here."

Each of those statements is false:

a. As shown by the opinion in *Potashnick* (609 F.2d at 1115), the issue reserved by the court there was whether a reversal on § *455(b)(5)(iii)* grounds

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[1] Such an argument suggests, contrary to the plain meaning of the statute and without any supporting authority, that every judge is allowed to violate his duty under Section 455(a) at least once with impunity. It nullifies the statute.

> would be foreclosed by Port City's failure to raise the issue of disqualification, or even to make an issue when invited to do so by the judge, until judgment was entered against it.
>
> The issue here is completely different: whether, as the 7th Circuit opinion (Pet. App. 33a) says: "Judicial acts taken before the [*455(a)*] motion may not later be set aside unless the litigant shows actual impropriety or actual prejudice."

Potashnick did not reserve that issue. Rather, on finding the trial judge should have disqualified himself under § 455(a), *Potashnick* reversed and remanded—even though the 455(a) motion was made *after* trial, as was done herein.

Thus, petitioner's citation of *Potashnick* as directly contrary to the 7th Circuit opinion here is correct; and, the opposition brief's statement to the contrary is false.

b. The falsity of the opposition brief's statement ("the [Potashnick] court vacated the judgment because of a violation of § 455(b), which is not an issue herein") is shown by the following statements in *Potashnick:*

> "We believe that a reasonable person with knowledge of the business investments of Judge Hand and Paul Brock and the legal representative of the judge by Brock might very well question the judge's impartiality in a trial involving Paul Brock as chief counsel for a litigant."
>
> "In deciding that Judge Hand should have disqualified himself under 28 U.S.C. 455(a) on the grounds discussed above we note . . ."
>
> "This court has decided that Judge Hand was disqualified for participating in the *Potashnick* proceeding *on two separate grounds.*" [455(a) and 455(b)] (690 F.2d at 1111, 1113, 1114; emphasis supplied)

As stated in the petition herein (p. 16), *Potashnick* reversed and remanded because of the court's finding an *appearance* of partiality in violation of Section 455(b)—even though

the motion for disqualification was made *after* trial and even though "none of the parties allege[d] any bias or prejudice in [the judge's] handling of the matter." (690 F.2d at 1112). Thus, as stated in the petition herein, *Potashnick* conflicts with the 7th Circuit opinion herein; and the opposition brief's description of it is false.

4. The opposition brief (p. 10) speaks of the "well known relationship" among the three chief trial participants, and (p. 11) of "petitioner's knowledge of the longstanding and open friendship between Judge Kocoras and the U.S. Attorney."

Both statements are false, as shown by the fact that there is no evidence in the record to support them; (none is cited in the opposition brief). Their falsity is further shown by the *uncountered* affidavits (Rec. 126, Ex. A, C) of petitioner and his additional trial attorney, Edward Calihan, stating that prior to trial herein neither of them had any knowledge of the existence of any close personal relationship between the judge and prosecutor.[2]

The falsity of the Solicitor General's unsupported assertion that "the friendship between Judge Kocoras and the U. S. Attorney was open" is further shown by the Petition for Removal of Judge Kocoras (filed under circumstances similar to those herein) in *Williams* v. *United States*, (Pet. No. 85-6080, App. 3a), where Defendant's trial attorneys stated they were aware that Judge Kocoras and U. S. Attorney Webb (the personal prosecutor of that case also) were friendly toward one another, but [were] unaware of a friendship that was not only of long duration, but was intimately personal, and was not the sort of friendly political relationship common among officeholders."

Moreover, the record herein shows that Judge Kocoras failed to disclose his "open" friendship with the prosecutor, just as (despite his sworn duty under Section 455) he failed to

[2] No counter-affidavits were filed by said judge or said prosecutor.

disclose his then-pending reservations for post-trial vacation with said prosecutor.[3] What openness!

B. MISLEADING STATEMENTS IN THE BRIEF IN OPPOSITION

1. The opposition brief is misleading in that it ignores petitioner's following arguments demonstrating the error of the 7th Circuit opinion:

- 7th Circuit holding requiring a showing of *actual* prejudice under Section 455(a) *conflicts* with rulings of other circuits and is *self-contradictory;*
- that holding is based on *inapplicable* cases;
- Section 455(a) has uniformly been read as being *mandatory* and *self-enforcing* in prior 7th Circuit opinions.

2. Also misleading (if not false) is the opposition brief's argument (p. 10) characterizing the timing of Judge Kocoras' and the prosecutor's joint vacation plans as "coincidental".

As shown by the circuit court opinion, there was nothing "coincidental" about their joint vacation:

> "*The trip had been planned before the trial,* and Judge Kocoras [sua sponte] advanced the date of sentencing so that he could *wrap up* the Murphy case before going on vacation with the Webb family. This was not an isolated event. The Webbs and Kocorases had

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[3] Failure of a trial judge to disclose pretrial his pending reservations for a post-trial vacation with the U.S. Attorney prosecuting the trial before him should *itself* to warrant disqualification pursuant to Section 455(a). See *Potashnick, supra, Roberts* v. *Bailar,* 625 F.2d 125, (6th Cir. 1980), *Home Placement Service, supra. Hall* v. *SBA,* 695 F.2d 175 (4th Cir. 1983); *Miller Ind.* v. *Caterpillar Tractor Co.,* 516 F.Supp. 84 (1980); *Dobson* v. *Camden,* 502 F.Supp. 679 (1980); *People* v. *Jackson,* 213 Cal. Rep. 521 (1985). Significantly, the opposition brief's argument does not even mention Judge Kocoras' failure to disclose his plans for post-trial vacation with the prosecutor.

> vacationed together at Calloway Gardens in 1982". (Pet., App. 25a; emphasis supplied)

Thus, that planned, joint vacation which the opposition brief argues is a "fortuity not likely to recur" had occurred previously, as found by the 7th Circuit opinion and as related in *Williams* v. *U.S.*, (pending herein as No. 85-6080).

The grave harm to petitioner of such argument is that it may mislead the Court into failing to evaluate this petition as relating to but the *latest* of Judge Kocoras' *repeated* violations of his duty under 28 U.S.C. 455(a).

3. As stated in the petition (p. 16):

> "That [7th Circuit] holding [requiring a showing of *actual* impropriety or prejudice] nullifies the plain language of Section 455(a)"

The brief in opposition (p. 11) doesn't address that argument, but misleadingly makes an assertion to the contrary and cites several cases pertaining to an altogether different statute: 28 U.S.C. *144*. The opposition brief (p. 12, fn. 6) increases its potential misleading of the Court by stating:

> "In other settings as well, this Court has refused to adopt a per se rule requiring a conviction to be reversed because of a statutory violation. See *Rosenberg v. United States*, 360 U.S. 367 (1959) . . . ; . . . *Rogers v. United States*, 422 U.S. 35 . . . of *United States v. Donovan*, 429 U.S. 413 . . ."

None of those cases supports the Solicitor General's assertion: *Rosenberg* held that failure to provide one Jencks Act statement (where 5 others were tendered) was "harmless error" since the subject information had otherwise been made available to the defendant; *Rogers* reversed a conviction *because* of violation of Fed. R. Crim. P. 43; and, in *Donovan* the court found no substantive violation of federal wiretap laws. Thus, not only do the cited cases fail to support the Solicitor General's assertion, they *disprove* it: because in both *Rosenberg* and *Donovan*, *if* the court *had* found a violation of the relevant statutes, it would have reversed those convictions as well. See *Clancy* v. *U.S.*, 365 U.S. 312; *U.S.* v. *Lilla*, 699 F.2d 99.

4. Further misleading is the opposition brief's argument (p. 12) that "Only one decision cited by petitioner (Pet. 15) reversed a judgment under Section 455(a) where the claim was not raised until after trial, *Hall v. SBA* . . ."[4]

That statement is incorrect. *Each* of the following cases cited in the petition (plus *Hall)* reversed a judgment under Section 455(a) even though the claim was not raised until *after* trial: *Potashnick v. Port City Construction Co., supra; Home Placement Service v. Providence Journal Co.,* 739 F.2d 674 (1st Cir., 1984); *Roberts v. Bailar,* 625 F.2d 125, *supra; Miller Industries v. Caterpillar Tractor Co., supra; People v. Jackson, supra.*

The opposition brief misleadingly argues (p. 12) that "*Hall* is best viewed as an example of actual bias imputed to the court." That argument is misleading because: 1) it ignores the finding in *Hall,* cited in the petition (p. 18), that the continuing participation of a magistrate's law clerk in a case before him which the clerk's future employers were counsel "gave rise to an *appearance* of partiality." (emphasis supplied); 2) it also ignores the court's statement in *Hall* that "there is not the slightest hint that [the magistrate] in fact engaged in any improper conduct,"; and, 3) it also ignores the very first sentences of the court's opinion in *Hall:* "Judicial ethics reinforced by statute exact more than virtuous behavior; they command impeccable *appearance.* Purity of heart is not enough. *Judge's robes must be as spotless as their actual conduct."* (Emphasis supplied)

In the face of such language from *Hall,* for the opposition brief to argue (as does the 7th Circuit opinion) that "*Hall* is best treated as an example of actual bias imputed to the court is

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[4] Footnote 7 following this sentence in the opposition brief is also incorrect. See p. 4, 5 herein as to its error regarding *Potashnick.* The pre-trial motion in *Roberts* v. *Bailar* claimed a violation of 28 U.S.C. *144.* All of the cases cited on p. 15 of the petition (except *McCuin* v. *Texas Power & Lt. Co.)* related to Section 455(a). *Each* such case affirmed that Section 455(a) is concerned only with the *appearance* of partiality or bias, as argued (p. 13-16) in the petition.

to blind itself to fact and so to demean the fairness and high quality of legal analysis rightfully expected from both a court of appeals and the Solicitor General. Contrast that opposition brief argument with *Dobson v. Camden,* 502 F. Supp. 679, 681 (1984) where recusal was ordered. Implementing the purpose of Section 455(a) and this Court's principle that "justice must satisfy the appearance of justice," the court there deemed it advisable in a Section 455(a) case to "bend over backwards to eliminate any possible taint on the judicial process."

Can this Court do less when here confronted with Judge Kocoras' *repeated* violation of 28 U.S.C. 455(a)?

C. The "Cost" of Disqualification Necessitated by Judge Kocoras' Violation of Section 455(a) Should Not be Charged to Petitioner.

The opposition brief (p. 11) argues:

> "upsetting a judgment on the ground that the trial judge's actions gave rise to an appearance of impropriety is unnecessary to safeguarding any personal rights of the losing party and needlessly penalizes both a successful party and the system as a whole" (citing *Home Placement* and *Potashnick)*

Home Placement is inapplicable because there the parties had stipulated the evidence to be considered on the issue of damages. Therefore, in granting a post-trial recusal motion, the court remanded only as to the issue of attorney's fees. Thus, the case is *not* precedent for denying a new trial upon granting a post-trial motion for recusal. Furthermore, upon granting such a motion, *Potashnick* does order a complete new trial.

Also in *Potashnick,* addressing a similar "costliness of reversal upon post-trial motion for recusal" argument (regarding a 33-day trial with a 25-volume record), the court said:

> "The unfairness and expense which results from disqualification . . . can be avoided . . . only if each judge fully accepts the *obligation* to disqualify himself in any case in which his impartiality *might* reasonably be questioned.[10]

"10. Recognizing the considerable confusion surrounding the law of disqualification in the past, we *emphasize* the

> clear path of the future." (609 F.2d at 1115, emphasis supplied)

Thus, under *Potashnick*, the failure of Judge Kocoras to accept his obligation under Section 455(a) *requires* his disqualification *despite* the expense that may cause. (It is ironic that the government (which, by the U.S. Attorney's co-equal silence, abetted Judge Kocoras' disregard of his duty) should now complain of the cost of disqualification caused by the judge's and prosecutor's disregard of duty.)

The opposition brief (p. 11) further argues that "a litigant should not be permitted to utilize a disqualification issue as part of his trial strategy." However, the *uncountered* affidavits supporting petitioner's motion for recusal and new trial establish that petitioner attempted no such strategy here. Moreover, corrollary is the principle, codified by section 455(a), that no judge should be permitted to disregard with impunity his sworn duty to appear impartial by keeping secret, before and during trial, his close, personal relationship (and pending reservations for post-trial vacation) with the U.S. Attorney[5] prosecuting defendant before him.

CONCLUSION

Certiorari is required here because "The appearance of prejudice is in itself a blight on the trial of a case that warrants a new trial, even if we were persuaded that the case would have come out no differently." (*McDaniel v. Temple Ind. School Dist.*, 770 F.2d 1340, 1352 (dissent; 5th Cir., 1985).

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[5] The co-equal secrecy by the U.S. Attorney (Dan Webb) is equally reprehensible and a violation of *his* duty. (*U.S. v. Berger*, 295 U.S. 78, 88)